

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5
6 SEARS HOLDINGS CORPORATION, Case No. 18-23538-rdd

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8 Debtor.

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12 U.S. Bankruptcy Court

13 300 Quarropas Street

14 White Plains, New York 10601

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16 May 29, 2019

17 2:14 PM

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22 B E F O R E :

23 HON ROBERT D. DRAIN

24 U.S. BANKRUPTCY JUDGE

25 ECRO: NAROTAM RAI

1 Notice of Agenda of Matters Scheduled for Hearing on May 29,
2 2019 at 1:30 p.m.

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4 Statement: Notice of Filing of Exhibits to the Disclosure
5 Statement for Joint Chapter 11 Plan of Sears Holdings
6 Corporation and Its Affiliated Debtors (related
7 document(s)3276)

8
9 Motion to Approve : Debtors Motion for an Order (I)
10 Approving Disclosure Statement; (II) Establishing Notice and
11 Objection Procedures for Confirmation of the Plan; (III)
12 Approving Solicitation Packages and Procedures for
13 Distribution Thereof; (IV) Approving the Forms of Ballots
14 and Establishing Procedures for Voting on the Plan; and (V)
15 Granting Related Relief (related document(s)3276, 3275

16
17 Objection of Relator Carl Ireland, Administrator of the
18 Estate of James Garbe [ECF No. 4007]

19
20 Objection of California Commercial Roofing Systems [ECF No.
21 3640]

22
23 Objection of California Commercial Roofing Systems [ECF No.
24 3641]

25

1 Objection of United States Trustee [ECF No. 3681]

2

3 Objection of U.S. Department of Labor, Employee Benefits
4 Security Administration [ECF No. 3759]

5

6 Objection of Linda J. Gonyo [ECF No. 3767]

7

8 Limited Objection of Winners Industry Co., Ltd. [ECF No.
9 3769]

10

11 Objection of Santa Rosa Mall, LLC [ECF No. 3771]

12

13 Objection of ESL Investments, Inc. [ECF No. 3988]

14

15 Objection of Wilmington Trust, National Association, as
16 Indenture Trustee and Collateral Agent [ECF No. 3990]

17

18 Limited Objection of Community Unit School District 300 [ECF
19 No. 3992]

20

21 The Canadian Plaintiffs' Limited Objection [ECF no. 3994]

22

23 Objection of the Official Committee of the Unsecured
24 Creditors [ECF No. 3995]

25

1 Objection of Santa Rosa Mall, LLC [ECF No. 3996]

2

3 Cyrus Capital Partners, L.P.'s Objection [ECF No. 3997]

4

5 Limited Joinder of Plus Mark LLC [ECF No. 4009]

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7 Sears Retiree's Joinder of Secretary of Labors Limited

8 Objection to the Disclosure Statement for Joint Chapter 11

9 Plan of Sears Holdings Corporation and its Affiliated

10 Debtors [ECF No. 4058]

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1 P R O C E E D I N G S

2 THE COURT: Okay. Good afternoon. In re: Sears
3 Holdings Corporation, et al.

4 MR. SCHROCK: Good afternoon, Your Honor. Ray
5 Schrock, Weil, Gotshal & Manges on behalf of the debtors.
6 I'm here today with my partners, Sunny Singh and Jared
7 Friedmann.

8 First of all, thanks very much, Your Honor, for
9 the additional time. I do think it was time well spent and
10 that, you know, we're in a position at this point where the
11 disclosure statement hearing should be, fingers crossed,
12 largely uncontested.

13 THE COURT: Okay.

14 MR. SCHROCK: Your Honor, again, thanks to your
15 court chambers, and we filed a number of documents over the
16 last 24 hours. We did file a copy of our reply, an amended
17 plan and disclosure statement, as well as an amended
18 liquidation analysis that we also filed last evening.

19 THE COURT: I've read each of those.

20 MR. SCHROCK: All right, Your Honor. And what I
21 would like to do is just make a few opening remarks and then
22 I can take you through some of the part -- court and parties
23 in interest through some of the plan amendments --

24 THE COURT: Okay.

25 MR. SCHROCK: -- and then just cover the

1 objections, if that would be okay.

2 THE COURT: That's fine.

3 MR. SCHROCK: Your Honor, it's extremely clear to
4 the debtors that we're in a situation where we need to have
5 a catalyst to wind up these cases. As we've said before we
6 believe this plan is that catalyst. And without a date set
7 for confirmation, without the ability to solicit votes, we
8 think these cases will languish and a plan will not be
9 confirmed, and we will face an administratively insolvent
10 estate.

11 And we are steadfast in our belief that what --
12 that, you know, not moving the dates is the right way to
13 resolve issues here. It's no coincidence to the debtors
14 that the one time that we seem to be able to resolve issues
15 in these cases -- we resolved some issues outside of the
16 court hearing dates, but the court hearings provide a funnel
17 and an ability for us to get things resolved in these cases.
18 And this hearing is certainly no exception to that.

19 We have a plan and a process for getting there,
20 and we've done our job in these cases. We were able to
21 prosecute the sale. We were able to save tens of thousands
22 of jobs. We have plan exclusivity which was just extended
23 with the consent of the UCC, and, you know, we frankly just
24 need to get to the end so that we can stop the in-fighting
25 among the various creditor groups.

1 Now we've crafted a plan with the support of the
2 largest unsecured creditor in the debtors' estates. That's
3 the PBGC. The PBGC, we believe, maintains a claim of up to
4 and in excess of 1.7 billion against all of the debtors on a
5 joint and several basis.

6 At the same time we've continued to work with
7 parties to resolve issues. We've met with the creditors'
8 committee on numerous occasions. We've met with the second
9 lien creditors. We continue to face literally hundreds of
10 inquiries from creditors on a daily and weekly basis, and
11 it's really, when you see the magnitude of the company it's
12 really extraordinary that we only have 13 disclosure
13 statement objections.

14 But at their core most of these inquiries and
15 disputes, because you have a number of parties in a
16 complicated case asking for more of what the debtors don't
17 have, that's more money. They -- every party is looking for
18 a little slice of this. We've got a plan, a liquidating
19 plan that follows the absolute priority rule, has a plan
20 settlement construct we believe makes sense. And it's the
21 one thing that we've heard from another -- a number of
22 creditors that bringing an end to these proceedings through
23 a confirmation should prove to be the best outcome.

24 Now in the case of ESL, we have been at numerous
25 meetings with ESL and, listen, this is just the debtors'

1 view, but I need to make clear for the record that, you
2 know, the debtors believe that ESL's agenda here is delay,
3 okay; that they want to delay these cases to fight because
4 they know that they're on the other end of a multi-billion
5 dollar complaint and this is something that, you know, these
6 see these estates, they're liquidating, and it's the nature
7 of the liquidating case. You know, if you're going to try
8 and argue against your plaintiff, you know, you can try and
9 engage in a war of attrition. We believe that's exactly
10 what's happened here.

11 And you need look no farther than what just
12 happened the other day with filing a complaint and we file a
13 motion. File a complaint because, frankly, it takes longer
14 and it cost more money.

15 On the 507(b) claims we filed a motion for
16 estimation of the 507(b) claims. I think that there's been
17 a competing schedule that was suggested and -- by ESL and
18 we're frankly fine with that schedule. We just think that
19 getting those matters heard and getting the schedule so that
20 they're heard in advance of confirmation is the right
21 outcome.

22 We don't have -- I don't have a lot of faith that
23 those matters are going to be resolved absent the court
24 ruling on them. I think everybody has a fundamentally
25 different view of what is a diminution in value claim in the

1 context of these cases.

2 We did make some adjustments in the context of the
3 plan to the plan settlement. As you may recall, Your Honor,
4 we had, originally it was an \$80 million priority recovery
5 against the litigation proceeds. They would take -- the
6 PBGC would then take steps to waive the \$120 million KCB
7 administrative claim and at the same time the PBGC would
8 agree to reduce its general unsecured claim to 800 million.

9 Well, as part of a settlement of substantive
10 consolidation the debtors agreed to increase the priority
11 claim of the PBGC to litigation proceeds of 297.5 million.
12 We lay out the rationale and the benefits of the settlement
13 in the disclosure statement.

14 We've also been working closely with counsel that
15 are pursuing preference actions, and I believe the first
16 round of demand letters is scheduled to go out imminently
17 which should -- you know, we're hopeful would provide
18 additional funds into these estates.

19 At a high level in terms of the changes to the
20 plan, Your Honor, we did incorporate revised terms of the
21 settlement of the interstate and intercreditor issues,
22 including substantive consolidation. The debtors believe
23 that the estates are hopelessly entangled and that the
24 vendors and trade creditors typically viewed the debtors as
25 a consolidated operation.

1 And in light of these and other consideration the
2 debtors filed a first amended plan to allow the settlement
3 of subcon (sic) with a toggle backstop to a deconsolidated
4 plan should the settlement of substantive consolidation not
5 be approved by the Court.

6 And now in response to the objections of parties
7 in interest, including the creditors' committee who argued
8 that certain creditors would be uniquely disadvantaged by
9 such a settlement, the debtors calculated a plan settlement
10 premium which would bridge the gap by providing incremental
11 recoveries to the effected K-Mart and guarantee creditors.
12 And that's in Section 9.2 of the plan.

13 More specifically, a percentage of the total
14 assets amongst the debtors will be available only for
15 creditors of K-Mart Corp. K-Mart of Illinois and K-Mart of
16 Washington, and of note the PBGC will not participate in any
17 distributions in excess of the amounts the PBGC would have
18 received under the plan without the settlement premium.

19 We still have the non-consolidated plan
20 alternative which we're deeming a toggle plan. The debtors
21 with -- now in that case if there were debtors with
22 insufficient assets to pay third party claims or vendors, we
23 would be able to get -- you know, make intercompany loans on
24 terms that were acceptable to the debtors and the PBGC.

25 A quick note on administrative claims, we do --

1 the debtors do believe, listen, we are administratively
2 solvent. We do have certain disputes that we are working on
3 in advance of confirmation. And our view on that issue is
4 if we have to go talk to administrative creditors at some
5 point in this process, and we'll certainly talk to the
6 committee and other parties about this, we will do that.
7 The plan has a mechanism that says you're going to be paid
8 in full in cash unless you otherwise agree.

9 And if the debtors find themselves in a situation
10 where we have to go out and talk to administrative claimants
11 at a given entity, we're certainly prepared to do that and
12 that's part of the restructuring committee's planning.

13 In terms of post-effective date governance, we
14 provide a composition of the liquidating trust board with
15 Allen Karr (ph) and Bill Tranzier (ph) who are members of
16 the debtors' restructuring subcommittee. The debtors have
17 also clarified removal procedures for liquidating trust
18 board members and we designated the debtors' chief
19 restructuring officer as the liquidating trustee.

20 We've made some changes to the releases at the
21 request of the SEC. And at the request of the U.S. Trustee
22 the debtors have clarified that the releases are not
23 intended to limit the liability of attorneys pursuant to New
24 York Rules of Professional Conduct.

25 We don't contemplate a discharge. We don't

1 contemplate -- and we've allowed the second lien creditors
2 to be solicited just because we don't know how the 507(b)
3 determination will ultimately be ruled upon by the Court.

4 Your Honor, I won't go through every change to the
5 disclosure statement, but I think at this point what I would
6 like to do is just thumb through some of the objections that
7 were filed and tell you how we've resolved them. And
8 perhaps if we -- subject to any comments or questions the
9 Court has we could address them one at a time, and I would
10 propose to use, you know, the order in which they appear on
11 the agenda or in the objection summary chart.

12 THE COURT: Okay. I don't care. Either one is
13 fine with me.

14 MR. SCHROCK: Okay. I think they're pretty much
15 the same, Judge, so I -- I'll just -- I have it in front of
16 me just the objection summary chart, the -- that was
17 attached to the debtors' reply.

18 Item 1 was actually a confirmation objection, I
19 believe. It was by Williamson County, et al. And that is a
20 confirmation objection. That remains open, but I don't --
21 our view is that should be addressed at confirmation. We
22 put it out -- in here out of an abundance of caution. It
23 was about certain liens attaching to property of the
24 debtors. You know, the plan treats all tax claims in
25 accordance with the Bankruptcy Code.

1 THE COURT: Okay. Is anyone here on the phone for
2 Williamson County and the other Texas counties that filed
3 the objection?

4 Okay. I agree with the debtors, the termination
5 of a response on this issue. I think it is a plan issue.
6 The plan provides for the allowance and payment of other
7 secured claims and priority claims, and there's no reason to
8 distinguish individual claims like this in the disclosure
9 statement.

10 MR. SCHROCK: Thanks, Your Honor.

11 The next objection is from California Commercial
12 Roofing Systems. That's at ECF Number 3640 and 3641. They
13 have argued that, for payment of an administrative expense
14 and they're seeking to compel payment. They've -- they --
15 it's styled as a disclosure statement objection, but I don't
16 believe it's a disclosure statement or a plan confirmation
17 objection. And we ask that the Court overrule that
18 objection.

19 THE COURT: All right. Is there anyone present
20 for California Commercial Roofing Systems?

21 All right. I agree with the debtors' response on
22 this. This is really a disclosure statement objection.
23 We'll -- we will deal later in the hearing with the plan and
24 disclosure statement's treatment of administrative expenses.
25 But this objection doesn't really deal with that. It just

1 seeks full payment.

2 MR. SCHROCK: Thank you, Your Honor.

3 The next objection was filed by the Office of the
4 United States Trustee. The debtors' position is that the
5 U.S. Trustee's argument is making arguments around the
6 nature or the releases that were being granted under the
7 plan. We did, you know, note that the disclosure statement
8 contains nearly three pages of justification regarding the
9 third party releases which are opt-out. And the debtors
10 will add a statement to the disclosure statement that the
11 U.S. Trustee opposes the releases contained in the plan.

12 You know, the debtor -- the U.S. Trustee had
13 certain other issues that we believe were resolved or noted
14 as confirmation objections. So we attempted to work with
15 the office. I think that Mr. Schwartzberg is here and he
16 wanted to say a few words to the Court and argue his point.

17 THE COURT: Okay.

18 MR. SCHWARTZBERG: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. SCHWARTZBERG: As Your Honor I'm sure has read
21 our objection and our concern is primarily the opt-in, opt-
22 out issue. The debtor says it's a confirmation issue, but
23 because we're seeking the approval of a disclosure statement
24 that will have a ballot, that will have the opt-in or opt-
25 out on it and I thought it would be appropriate to at least

1 raise it at this point.

2 I'm aware the Court has ruled on this issue in
3 other instances, but I just wanted to note in this
4 particular case creditors are getting a small distribution,
5 if any. The likelihood that a lot of these creditors are
6 going to page through the hundreds of pages of documents
7 that they'll get in terms of the opt-in or opt-out are
8 minimal or unlikely.

9 Also, I note in this particular case --

10 THE COURT: It may be then they don't really care
11 about the claim either. But I'll leave that for another
12 day.

13 MR. SCHWARTZBERG: Also, Your Honor --

14 THE COURT: That they're opting in or out --
15 opting out of.

16 MR. SCHWARTZBERG: Correct, Your Honor.

17 The debtors are also liquidating. There's no
18 post-confirmation operations, so the need or the likelihood
19 or the need of effectuating the plan to have these releases
20 is questionable.

21 And then when I asked in our objection why they
22 need the releases and what's being given in return, the
23 debtor basically indicated that the individuals or the
24 officers and directors had done their jobs and guided this
25 debtor through confirmation and made it as if their award in

1 the releases are -- the award of the releases are a bonus or
2 some sort of award for doing a good job during the
3 bankruptcy. And we believe under Second Circuit law, which
4 requires extraordinary circumstances, that the debtors
5 aren't describing an extraordinary circumstance. And,
6 therefore, the releases should be considered not under the
7 (indiscernible) and they had -- they have to come in under a
8 consensual or non-consensual venue.

9 And, therefore, based on the case law that we cite
10 in the -- in our objection which I know Your Honor has at
11 times taken an opposite determination. But based on the
12 circumstances of these cases, including the liquidation of
13 the debtor and the apparent no need for these officers and
14 directors to look at the releases to continue their jobs
15 post-confirmation, we believe it should be an opt-in rather
16 than an opt-out.

17 THE COURT: Okay.

18 MR. SCHWARTZBERG: If Your Honor has any questions
19 I'll --

20 THE COURT: No. I mean, as you know I disagree
21 with that view. I think the plan is binding if people don't
22 object. I did have a couple of comments and we'll get to
23 them on the description of the opt-out right. I wanted to
24 beat that up a little bit.

25 MR. SCHROCK: Certainly.

1 THE COURT: And I think we glossed over this, but
2 I just want to make sure. The -- there are claims that I
3 think, the other secured claims, I think those claims --

4 MR. SCHROCK: Yes.

5 THE COURT: -- would be unimpaired but for the
6 release issue, right?

7 MR. SCHROCK: Correct.

8 THE COURT: And I think -- I came to understand
9 that, but I think -- and I'll mention this when I give you
10 my comments on the disclosure statement. I don't think it's
11 clear in the plan -- I mean, clear in the description of
12 their plan treatment and the disclosure statement that's why
13 they're impaired. So I -- just we'll get to it later. But
14 I think there needs to be something stated that that's why
15 they're impaired and voting because your ordinary bankruptcy
16 lawyer would look at that and say, well, why --

17 MR. SCHROCK: Right.

18 THE COURT: -- why do you have them voting.

19 MR. SCHROCK: Yeah. Very well, Judge. Yeah. Of
20 course we'll be --

21 THE COURT: And that's --

22 MR. SCHROCK: -- happy to add that.

23 THE COURT: -- the deal with the Chasick's (ph)
24 issue.

25 MR. SCHROCK: Excellent.

1 THE COURT: Okay. So I believe that the true
2 disclosure statement objections by the U.S. Trustee have
3 been dealt with by the revisions to the disclosure statement
4 and/or the plan. And the remaining objections really are
5 plan issues. On these facts I tend to agree with the U.S.
6 Trustee that meeting the Metro Media standards would be a
7 heavy burden. But at the same time that's not the only
8 basis for a release under a plan by third parties. And I
9 think the mechanism that the plan lays out is fair for
10 voting purposes and disclosure purposes.

11 MR. SCHROCK: Thank you, Your Honor.

12 The next objection was filed by the U.S.
13 Department of Labor as well as I believe there was a joinder
14 to that objection that was filed yesterday.

15 This, you know, as Your Honor has probably saw
16 there was a motion filed to form a retiree committee.

17 THE COURT: I didn't see that. Was that filed
18 yesterday?

19 MR. SCHROCK: It was filed yesterday, Your Honor.

20 THE COURT: Okay.

21 MR. SCHROCK: Yes. And, you know, the -- I think
22 the contention here was that, you know, the debtor should
23 have to justify and go through 1114 in order to terminate
24 any retiree benefits. We provide an explanation in the
25 disclosure statement that we believe that none of those

1 benefits were, in fact, vested. And we think that, you
2 know, that at this point it's a disclosure issue. We've
3 provided adequate disclosure around it, and if there would
4 have to be, subject to the Court actually hearing the 1114
5 motion if there had to be an additional change in treatment,
6 you know, then -- or if there had to be additional
7 disclosure we could always supplement.

8 But at this point we've put everything that we
9 know about those claims in here and we provided, you know,
10 why we, in fact, terminated those benefits because they
11 were, in fact, not vested.

12 THE COURT: Well, the disclosure says it was
13 terminated because you had a right to terminate --

14 MR. SCHROCK: Yes.

15 THE COURT: -- under the --

16 MR. SCHROCK: Right. I meant --

17 THE COURT: -- plan document.

18 MR. SCHROCK: -- without going through 1114.

19 THE COURT: Right.

20 MR. SCHROCK: I misspoke.

21 THE COURT: Okay. So is the counsel for the DOL
22 here?

23 UNIDENTIFIED SPEAKER: He's on the phone, Your
24 Honor, I believe.

25 THE COURT: Mr. Gerson, are you on the phone?

1 (Pause)

2 THE COURT: Well, is he on there?

3 UNIDENTIFIED SPEAKER: Uh-huh.

4 THE COURT: It is -- it's on -- it's not on mute,
5 right?

6 MR. GERSON: Good --

7 THE COURT: Oh, there we go. Is that counsel for
8 the U.S. DOL?

9 MR. GERSON: That's correct, Your Honor.

10 THE COURT: Oh, okay. Could you just state your
11 name for the record?

12 MR. GERSON: Leonard Gerson.

13 THE COURT: All right. Good afternoon.

14 MR. GERSON: Good afternoon, Your Honor.

15 THE COURT: So I -- I've read the objection and
16 the discussion of this issue in the disclosure statement.
17 I'm just trying to turn to it now. Here it is on page 37.
18 And the objection points out that the last paragraph of that
19 discussion states that:

20 "The debtors were advised that in 2001 Sears
21 Roebuck had entered into a stipulation of settlement In re:
22 Sears Retiree Group Life Insurance litigation, Civil Action
23 Number 97 in connection with the reduction of certain
24 retiree life insurance benefits available to eligible
25 retirees at that time.

1 "Under the stipulation Sears Roebuck agree that it
2 would not reduce or terminate the retiree coverage subject
3 to the stipulation and would amend the applicable plan
4 consistent with such limitation. The debtors do not
5 currently have information with respect to the identities of
6 the retirees that were covered by the stipulation."

7 And then it says:

8 "Further, based on review of its file the debtors
9 are not aware of any such amendment having been made to the
10 retiree plan that was terminated by the debtors."

11 So I guess my question for the debtors is was this
12 civil action, was it a class action, were there -- who were
13 the parties to it? I would think that that would give you a
14 window into who -- into what this agreement covered.

15 MR. GERSON: Are you --

16 THE COURT: Mr. Schrock is conferring.

17 MR. SCHROCK: Yes. Sorry, Your Honor.

18 Your Honor, I don't -- we don't know at this point
19 who the -- you know, who specifically was a party to the
20 action at this point.

21 THE COURT: Was it a class action?

22 MR. SCHROCK: Not that we're aware of, Your Honor.

23 THE COURT: Okay. I guess what -- I'm just
24 concerned that the debtors may not have done enough on this
25 point. You know --

1 MR. SCHROCK: Okay.

2 THE COURT: -- when litigation started there's
3 usually defendants and plaintiffs and parties covered by it.
4 And in part I think this goes to the notice issue as to, you
5 know, whether these people are getting notice of the
6 confirmation hearing, for example. So that's my --

7 MR. GERSON: Your Honor, can I --

8 THE COURT: -- that's my --

9 MR. GERSON: -- add something --

10 THE COURT: Sure.

11 MR. GERSON: -- that might be helpful?

12 THE COURT: Yes.

13 MR. GERSON: Yeah. It -- according -- first off,
14 according to the stipulation the settlement that was annexed
15 to our objection, it was a class action. And possibly even
16 more to the point, the motion filed yesterday seeking the
17 appointment of a retiree committee was filed by one of the
18 attorneys, Mr. Molder (ph), who describes himself as lead
19 counsel in the class action.

20 And the motion itself was filed by two members,
21 one the chairman, one head of the board of benefits of the
22 National Association of Sears Employees which is a voluntary
23 organization that's still in existence.

24 And in the papers it's further alleged in contrast
25 to the statement in the disclosure statement that the

1 debtors only learned about this stipulation after the
2 termination of the retiree plan. The papers allege that on
3 March 12th, I believe, which was subsequent to the March 7
4 decision by the Sears Board of Directors to terminate the
5 plan, but prior to the March 15th effective date of the
6 termination Mr. Obresh (ph), the chairman of the retiree
7 association, notified the head of Sears HR that, in fact,
8 the stipulation existed and that a number of retirees were
9 vested and Sears had -- Sears did not have the unilateral
10 right to terminate their benefits. That conflicted with the
11 stip -- the court-ordered stipulation.

12 And your decision in Delphi which the debtors have
13 amended their disclosure statement and cited as the basis
14 for their terminating the retirement plan without Section
15 1114 approval. As you may remember, while that was the
16 ruling in that case, you also, as we mentioned in our
17 objection, established a retiree committee to make sure that
18 none of the retirees were actually vested and thus required
19 the -- a Section 1114 process to go forward.

20 Well, I mean, that's the situation that appears to
21 exist in this case.

22 THE COURT: Well, I don't know. I mean --

23 MR. GERSON: Of course, it --

24 THE COURT: -- I wasn't even aware of yesterday's
25 filing. So that's not really before me today. What I am

1 concerned about is whether the description here is accurate.

2 MR. SCHROCK: The -- Your Honor, we're happy to
3 have a meet and confer and frankly add additional language.

4 THE COURT: Yeah. I think that's what the people
5 should do here. I mean, even the stipulation that was
6 attached --

7 MR. SCHROCK: Right.

8 THE COURT: -- it actually -- my version isn't so
9 ordered. It's just signed by --

10 MR. SCHROCK: Right.

11 THE COURT: -- by counsel for the plaintiffs.

12 MR. SCHROCK: Yeah. Our understanding is there
13 was a stipulation and then --

14 THE COURT: Anyway --

15 MR. SCHROCK: -- Sears never did anything.

16 THE COURT: -- I think -- are you one of the
17 counsel, sir?

18 UNIDENTIFIED SPEAKER: Yes, Your Honor. I
19 represent the two retirees.

20 THE COURT: Okay. I mean, I think -- I came into
21 this hearing not -- as I said not knowing about the motion
22 that you filed yesterday. I really was at a bit of a loss
23 as to who the debtors should be talking with about this.
24 Maybe they should be talking to you since you filed this
25 motion. Not knowing that I was going to suggest that they

1 dig further into the civil action to see if they could get
2 more out of it than what was attached to the DOL's response.

3 But I think that there needs to be some language
4 added here to try to give some clarity as to who the parties
5 were to that stipulation and whether it was, in fact,
6 approved as part of the class settlement or the like. It
7 just -- it wasn't clear to me at this point.

8 UNIDENTIFIED SPEAKER: That's fine, Your Honor.

9 MR. SCHROCK: We --

10 THE COURT: Okay.

11 MR. SCHROCK: We are happy to meet and we're happy
12 to add additional language.

13 THE COURT: Okay. Very well. So that --

14 MR. GERSON: And, Your Honor, this is a disclosure
15 statement objection, so that's all that would be required.

16 THE COURT: Right. That's right.

17 So I'm going to give you some language on other
18 parts of this. This one is just -- had a question mark. So
19 -- but the record will reflect how the parties are going to
20 deal with it.

21 There is a typo in the first -- in the second line
22 of this paragraph. I'll give you my markup and you'll see
23 it there. Certain retired employees of the Sears covered
24 under the -- just doesn't quite fit. So there's a missing
25 word or something there.

1 MR. SCHROCK: Okay. Very well, Your Honor. We're
2 happy to make the change.

3 THE COURT: Okay.

4 MR. SCHWARTZBERG: Thank you, Your Honor.

5 THE COURT: Thanks.

6 MR. SCHROCK: Your Honor, I'm sorry. The sixth
7 objection was from a Ms. Gonyo, ECF Number 3767. She had
8 noted that the disclosure statement does not adequately
9 define general unsecured liquidating trust interest and the
10 specified unsecured liquidating trust interest including a
11 description of the assets. The debtors noted some language
12 that they've added to Disclosure Statement Section 1(c) that
13 we believe addressed -- that addressed it. But we wanted to
14 confirm it. We just haven't received a response, I believe,
15 whether or not that resolves the issue.

16 THE COURT: Okay. Is counsel for Ms. Gonyo here
17 or on the phone?

18 Okay. I reviewed the changes. I think for
19 someone that wasn't living with this as the debtors'
20 professionals have been and these professionals and others I
21 somewhat sympathize with this objection. But I think the
22 language is -- that's been added clarifies it.

23 I did have one point I wanted to raise with you
24 all that I'll -- which is as far as I could see there's
25 nothing in the disclosure statement as to whether these

1 interests were intended to be tradable or the like. And I
2 think that's probably worth noting, or if tradable how trade
3 -- you know, how they would be.

4 MR. SCHROCK: Your Honor, we're -- we'll be happy
5 to address it.

6 THE COURT: Okay.

7 MR. SCHROCK: We were trying to keep our options
8 open on that particular one.

9 THE COURT: Well, you could say that, too. I just
10 -- I just want to -- you know, I think that -- and you may
11 need to run that by the SEC, the --

12 MR. SCHROCK: Yes. Exactly.

13 THE COURT: -- people that gave you comment.

14 MR. SCHROCK: We don't want to become a public --

15 THE COURT: But I --

16 MR. SCHROCK: -- you know, reporting unit.

17 THE COURT: But I think that not having anything
18 about that may disadvantage --

19 MR. SCHROCK: Yes.

20 THE COURT: -- small holders who are not as easily
21 advised on trading issues as larger holders.

22 MR. SCHROCK: Your Honor, we can certainly -- I
23 know we have some language from other cases that we can pull
24 around that. So we will --

25 THE COURT: Okay.

1 MR. SCHROCK: -- do so.

2 THE COURT: Okay.

3 MR. SCHROCK: Your Honor, the next objection I
4 believe has been resolved. It was Winners Industry Company
5 Ltd., Number 7 at ECF Number 3769. We added some disclosure
6 in Section 4(t) and we believe that that, you know, resolves
7 the issue.

8 THE COURT: All right. Is there anyone here for
9 Winners Industries?

10 Okay. I saw that language. I revised it slightly
11 to be a little more consistent with my ruling, but I think
12 it does as revised address the -- what actually happened on
13 this point I guess last week.

14 MR. SCHROCK: Thank you, Judge.

15 THE COURT: Okay.

16 MR. SCHROCK: Number 8 is the Santa Rose Mall, LLC
17 ECF Number 3771 and 3996. They had asked that the
18 disclosure statement included information regarding the
19 insurance policy that provides coverage for damage caused by
20 the hurricanes to the movant's property. You know, we
21 didn't believe any additional disclosure would be required.
22 We thought that -- we reached out to the party to confirm
23 and the party stated their objection was not resolved --

24 THE COURT: Okay.

25 MR. SCHROCK: -- at this point.

1 THE COURT: Is there anyone here for Santa Rosa
2 Mall? On the phone?

3 MR. CHICO-BARRIS: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. CHICO-BARRIS: Yes, Your Honor. Good
6 afternoon. I am Gustavo Chico on behalf of Santa Rosa Mall.

7 THE COURT: Okay. I mean, the parties are in --
8 they have their own dispute on this. I don't think -- I
9 mean, there -- there will be discovery in that dispute if
10 there hasn't been already. I don't think any other party in
11 interest has any interest in this issue as a disclosure
12 matter for purposes of the plan.

13 So in other words a disclosure statement is not a
14 substitute for taking disclosure in the case on discreet
15 issues that are really X, V, Y, creditor versus debtor type
16 issues. So I just don't think this is an appropriate
17 addition to a disclosure statement.

18 So I'm going to overrule the objection.

19 MR. SCHROCK: Thanks very much, Your Honor.

20 The next objection is from ESL Investments which
21 is at ECF Number 3988. They had a number of objections that
22 we believe we resolved through additional language. They
23 actually gave us some further additional language tweaks
24 right before the hearing. I think that ESL's counsel wanted
25 to say a few words related to the 507(b) claims process and

1 other issues. But I believe we're largely resolved unless

2 --

3 THE COURT: Okay.

4 MR. SCHROCK: -- Sean tells me otherwise.

5 THE COURT: Okay. The first thing you're going to
6 tell me is ESL really doesn't want to drag this out --

7 MR. O'NEAL: That's --

8 THE COURT: -- that it was just asked to answer on
9 both 507(b) and the APA disputes.

10 MR. O'NEAL: There is an element of truth to that.

11 (Laughter)

12 THE COURT: Okay.

13 MR. O'NEAL: So -- and actually Mr. Schrock gave
14 me an opportunity to raise an issue that I wanted to, which
15 I think he had mentioned that we are focused on trying to
16 delay the APA resolution.

17 THE COURT: Right.

18 MR. O'NEAL: And that's why we filed the
19 complaint. And I would like to have the privilege of
20 correcting that record.

21 Last week before we filed a complaint we had a
22 meeting with Weil and others, and we told them that we were
23 going to file a complaint because we wanted to get these
24 issues resolved. And the response was that they would file
25 a motion to enforce the APA. They were faster. They filed

1 their motion and then an hour or two or maybe three later we
2 filed our complaint.

3 But in this courtroom I've found that sometimes
4 folks are trying to vilify ESL and try to ascribe all sorts
5 of misconduct or other kinds of allegations. The fact is --
6 and we've seen that. We've seen that with the sale hearing.
7 We've seen it with fraudulent conveyance complaint. We've
8 seen it with the APA litigation. We've seen it at nearly
9 every hearing we've come to today.

10 But as with those matters what we will find is
11 that the facts will belie that actual suggestion that we're
12 trying to delay. If you look at the complaint itself, it's
13 very -- it's page 4. It says, transform brings this
14 adversary complaint rather than a motion primarily because,
15 among other things, it claims -- it seeks -- it seeks
16 damages from the defendants. Transforms' representatives
17 are prepared to meet and confer and settle on a schedule
18 that would permit the resolution of its claims prior to or
19 as part of the Chapter 11 plan confirmation.

20 THE COURT: That's --

21 MR. O'NEAL: So that's --

22 THE COURT: -- correct. It says that and that's
23 what the parties should do.

24 MR. O'NEAL: Yeah. And that's what we -- that's -
25 - I stand here today telling you that's what we'll do.

1 THE COURT: Okay.

2 MR. O'NEAL: I think the other thing that we
3 wanted to talk about, we do have a number of disputes about
4 the plan. But we're going to push those to the side for
5 now. And I think we tried to be constructive and save
6 people time by giving line edits to the disclosure statement
7 and we appreciate Mr. Schrock and Mr. Singh including those
8 comments.

9 But we still do have some disagreements and we do
10 think there will be serious confirmation issues. And one
11 issue that we did want to address to the Court briefly is
12 the 507(b)(9) cap. I think we're -- we were frankly
13 surprised that this has become an issue. We believe the
14 language in Section 913 of the APA is -- which is replicated
15 in the sale order is clear.

16 THE COURT: Well, on that point I had a suggestion
17 on the plan and disclosure statement, is that you guys just
18 track that language, track -- you know, or say as provided
19 in those two documents.

20 MR. O'NEAL: Certainly.

21 THE COURT: And that's -- that -- you know, that
22 way no one can say anyone's rewriting anything.

23 MR. SCHROCK: Yes. Yes, Your Honor.

24 THE COURT: Okay.

25 MR. O'NEAL: That would be acceptable to us. We

1 can compare the language after the hearing.

2 THE COURT: Okay.

3 MR. O'NEAL: Thank you, Your Honor.

4 And I think -- with that I don't think we have any
5 other comments. I could go through with you the arguments
6 on --

7 THE COURT: No.

8 MR. O'NEAL: -- our 507(b) --

9 THE COURT: No need.

10 (Laughter)

11 MR. O'NEAL: But I'm sensing that maybe that is
12 not what you want to do.

13 THE COURT: I just don't -- I mean, I think the
14 language speaks for itself.

15 MR. O'NEAL: Yes. Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. SCHROCK: Thank you, Your Honor.

18 I believe the next objection is from Wilmington
19 Trust which is at ECF Number 3990, and I believe that we
20 have resolved the issue with -- issues with Mr. Fox. We,
21 you know, included language in Section 4(d)(3) of the
22 disclosure statement. You know, we confirmed that we gave
23 them the right to vote as a secured claimant to the extent
24 they have secured claims. And -- but Mr. Fox is here.

25 THE COURT: Okay.

1 Actually, before -- you're right by a microphone,
2 too, Mr. Schrock.

3 MR. SCHROCK: Yeah.

4 THE COURT: I -- it wasn't clear to me. Maybe I
5 just didn't -- maybe I glossed over the paragraph. The
6 toggle plan --

7 MR. SCHROCK: Uh-huh.

8 THE COURT: -- goes debtor by debtor.

9 MR. SCHROCK: It does.

10 THE COURT: So does the voting order, the voting
11 procedures order now contemplate that this class will vote
12 debtor by debtor?

13 MR. SCHROCK: Yes, Your Honor.

14 THE COURT: Okay. All right. Okay.

15 MR. FOX: Good morning or good afternoon, Your
16 Honor. Edward Fox from Seyfarth Shaw on behalf of
17 Wilmington Trust National Association as indentured trustee
18 and collateral agent.

19 Your Honor, some issues have been resolved. I
20 think some have not. And I think there are some new issues
21 given the debtors' filings within the last 24 hours of a
22 significantly amended plan that in some cases, at least to
23 me, is not all that clear as to how that's supposed to work.

24 In no particular order let me start with the
25 voting issue for the second lien notes in Class 2 which is

1 the other secured claims. The debtor says in its response
2 that it will have the -- them vote. But otherwise if you
3 parse through the language none of it actually says that.

4 So at a minimum the proposed order has to be
5 changed to reflect that. The reason why is that the plan
6 defines other secured claims to specifically exclude the
7 second lien notes. The plan then says that second lien debt
8 shall receive the same treatment as holders of other secured
9 claims to the extent that the claim is secured.

10 So you kind of don't know today or when the
11 ballots go out whether they're going to be treated as
12 secured or unsecured. The debtors' response says that they
13 will be allowed to vote. Mr. Schrock, when he said it on
14 the record just a minute ago, left open that question of if
15 they're secured.

16 So my understanding of what the debtors intend is
17 to provide that they will vote and then they'll -- in Class
18 2 and the debtors and the Court or all of us will decide
19 later whether, in fact, those votes will be counted in --

20 THE COURT: Right.

21 MR. FOX: -- Class 2 or not.

22 THE COURT: So you're right. The --

23 MR. SCHROCK: That's correct.

24 THE COURT: The definition on page 12 of the plan
25 needs to be changed on this. That's the 1.118 of the

1 secured claim. I think it should be changed to say means a
2 secured claim, period. I mean, I think this -- the
3 definition of secured claim --

4 MR. SCHROCK: Yes.

5 THE COURT: -- is the definition we all know which
6 is to the extent that you have assets that are collateral,
7 then --

8 MR. SCHROCK: You're right, Judge. That's an
9 error. It should be --

10 THE COURT: Okay.

11 MR. SCHROCK: There should be --

12 THE COURT: Right.

13 MR. SCHROCK: It should be a period. We'll
14 exclude clauses A, B and C.

15 THE COURT: All right.

16 MR. FOX: Yeah. The problem was that there's the
17 open question --

18 THE COURT: Right.

19 MR. FOX: -- today --

20 MR. SCHROCK: As to whether or not --

21 MR. FOX: -- as to whether or not --

22 THE COURT: And on that point, the debtors do
23 discuss to some extent that they believe that these claims
24 are not going to be secured claims.

25 MR. FOX: Yeah. The language that was added to

1 the disclosure statement to describe the debtors' views
2 about that --

3 THE COURT: Right.

4 MR. FOX: -- I'm not raising an issue with. We --

5 THE COURT: Okay.

6 MR. FOX: -- appreciate the fact that they added
7 it.

8 THE COURT: It's just the plan, the way the plan
9 works.

10 MR. FOX: It's just a question of the way the
11 voting works.

12 THE COURT: Right.

13 MR. FOX: And I would also point out that what
14 they filed last night did not include all the ballots. So
15 we haven't seen the specific ballots that would go out to
16 the specific holders. We've seen samples. And I -- there
17 are multiple iterations of the ballots depending on who is
18 voting.

19 THE COURT: Okay.

20 MR. FOX: So for the noteholders there's a
21 different form of ballot than what's attached to the
22 exhibits that were filed overnight.

23 THE COURT: All right. But there was nothing
24 wrong with that -- those forms. It's just --

25 MR. FOX: So far --

1 THE COURT: Okay.

2 MR. FOX: -- so good.

3 THE COURT: All right.

4 MR. FOX: They need to add to that the voting in
5 Class 2. But we just need to see it because we -- it -- we
6 haven't seen it.

7 THE COURT: That's fine.

8 MR. FOX: Also with respect to voting, and this
9 goes to changes that were made in the plan yesterday -- and
10 in fairness to the debtors they did send us a copy --

11 MR. SCHROCK: Monday.

12 MR. FOX: -- 2:30 on Monday on Memorial Day as
13 well. But --

14 MR. SCHROCK: 2:30 p.m.

15 MR. FOX: Yes. Yes. But --

16 (Laughter)

17 MR. FOX: But it's not clear from reading the plan
18 as far as I can tell with respect to K-Mart, K-Mart of
19 Illinois and K-Mart of Washington when it refers to the
20 treatment of general unsecured claims if it's referring to
21 the treatment of general unsecured claims of those specific
22 debtors or the defined term generally as just general
23 unsecured claims against anybody in the case.

24 So you can't tell from reading the plan what's
25 intended, and then you can't tell -- if you can't tell what

1 the plan means, you can't determine whether the disclosure
2 is correct.

3 THE COURT: I had the same problem. I think I
4 understand it's general unsecured claims against those
5 debtors.

6 MR. SCHROCK: Yes.

7 THE COURT: But I think it was just a little too
8 eloquent. I think you need just to add some language just
9 to make it clear that --

10 MR. SCHROCK: We'll do so, Judge.

11 THE COURT: -- to the extent it's against those --

12 MR. FOX: Yeah.

13 THE COURT: -- unsecured claims against those
14 specific debtors.

15 MR. FOX: Right. And then -- and that also
16 affects the notes because the guarantee claim is against
17 multiple debtor entities.

18 THE COURT: But it's only against those debtors
19 where there's the bump up.

20 MR. FOX: That's correct.

21 THE COURT: Right.

22 MR. FOX: But because the notes have guarantee
23 claims --

24 THE COURT: No. I know. They could get all
25 excited and think, oh, we're getting the bump up, but that's

1 not the case.

2 MR. FOX: Well, I think they're supposed to
3 because they are --

4 THE COURT: Against those debtors.

5 MR. FOX: Against those debtors. Right.

6 THE COURT: But not against all of the debtors.

7 MR. FOX: Right. But it --

8 THE COURT: Yeah.

9 MR. FOX: Yeah.

10 THE COURT: Okay.

11 MR. SCHROCK: And it's 53, you know, we're
12 counting votes separately for each plan.

13 THE COURT: Correct.

14 MR. FOX: Right. Yeah. That part and we
15 appreciate the fact the debtor changed that.

16 The -- with respect to the liquidation analysis we
17 raised concerns about that. The debtors' response was,
18 well, we'll deal with that at confirmation. I appreciate
19 the best interest test point at confirmation, but it's also
20 a disclosure statement issue, particularly in this case
21 since the holders are being asked either vote for a
22 liquidating plan or if they vote against it, they'll wind up
23 with a liquidation and a Chapter 7.

24 And so the disclosure concerning the liquidation
25 analysis is particularly relevant, I think, here given the

1 alternative. And that's really what people are -- the
2 holders are being asked to choose between.

3 THE COURT: But I -- I thought given the revised
4 analysis or the amended analysis which includes both a --
5 the plan and the toggle plan --

6 MR. FOX: Yeah. There's two --

7 THE COURT: -- that they covered most of your
8 points. I mean, I appreciate that you have --

9 MR. SCHROCK: We tried to --

10 THE COURT: -- some disagreements with them about
11 various discounts. But those are things that people can
12 factor in themselves. I think, you know, you can do your
13 own analysis as to whether it should be 30 percent or 25
14 percent or 15 percent or --

15 MR. FOX: Well --

16 THE COURT: Same with the fees, those sorts of
17 things.

18 MR. FOX: Remember, Your Honor, that Wilmington
19 Trust is here on behalf of the noteholders. They're the
20 ones who are going to vote. They're not --

21 THE COURT: No. I understand.

22 MR. FOX: -- necessarily the sophisticated parties
23 who are able to make that determination.

24 THE COURT: But I don't -- to me the real issue
25 with the liquidation analysis was not showing the non-

1 substantive consolidation aspect of it. And I think they've
2 dealt with that.

3 MR. FOX: The comparison between substantive and
4 non.

5 THE COURT: Yeah.

6 MR. FOX: No. I understand that.

7 THE COURT: And in both cases against Chapter 7.

8 MR. FOX: Right. It's really the comparison
9 against Chapter 7, the issues of, you know, being -- having
10 lower recoveries because a Chapter 7 trustee will be in a
11 hurry or is going to --

12 THE COURT: Well --

13 MR. FOX: -- you know, hire more lawyers.

14 THE COURT: But I think -- look, people can -- I
15 mean, they -- these people are bondholders. I mean, I think
16 they -- and they can call you up and ask them about those
17 sorts of things. They -- you could point them to your
18 objection. I just don't think there's any -- once you get
19 into that level of detail, everyone has their different
20 views on those points. So --

21 MR. FOX: Also, Your Honor, we asked for -- we
22 asked the debtors to provide information about the claims
23 that they believe are being released by the releases
24 because, again, the holders are voting for that, and their
25 response was they don't need to do that.

1 Given the fact that holders are being asked to
2 vote on a plan which is going to include releases, we think
3 at least with respect to the third parties or the, I guess
4 it's the directors and their officers, if there are claims
5 out there that holders should be given some understanding of
6 what they are that's being released.

7 THE COURT: Right. Well, on that point are the
8 debtors aware of potential claims that go beyond D&O
9 insurance, that wouldn't be covered by D&O insurance?

10 MR. SCHROCK: Just those that are, you know,
11 subject to what counsel of the subcommittee would have to
12 say about that, just those that are being prosecuted by the
13 subcommittee. Not all those are D&O claims.

14 THE COURT: Okay.

15 MR. SCHROCK: There's preference claims,
16 obviously, but, you know, as to third party type claims I --

17 MR. FOX: All we know, Your Honor, is that --

18 THE COURT: I mean, as I understand it the release
19 that you're addressing is a partial release because it
20 doesn't release --

21 MR. SCHROCK: Right. So we would have preserved
22 --

23 THE COURT: -- claims that would be --

24 MR. SCHROCK: -- claims like --

25 THE COURT: -- covered by D&O insurance.

1 MR. SCHROCK: That's correct.

2 THE COURT: So I'm just trying to figure out are
3 there meaningful claims against people with -- then the
4 other question is do people have meaningful assets?

5 MR. FOX: We have no idea, Your Honor.

6 THE COURT: Okay.

7 MR. BASTA: Your Honor, Paul Basta from Paul Weiss
8 for the subcommittee.

9 In our papers that we filed one of the objections
10 of the committee was that we -- the plan was releasing
11 claims of potential defendants.

12 THE COURT: Right.

13 MR. BASTA: And my understanding on -- in the
14 mechanic is, you know, we can designate in the plan
15 supplement who is and is not going to be getting released.
16 But our intention is not to release anybody under the plan
17 that is a potential defendant in the lawsuit. And the
18 lawsuit, from our perspective, is covering the material
19 causes of action of the estate.

20 THE COURT: All right.

21 MR. CLAYTON: Your Honor, Lou Clayton. Just to
22 clarify that obviously the people who are already named --

23 THE COURT: Well, they're not getting a release.

24 MR. CLAYTON: -- in the (indiscernible) complaint
25 are not getting releases.

1 THE COURT: Right.

2 MR. CLAYTON: And we intend to make sure that the
3 list of people not getting releases will include everyone
4 who had any material role in the transactions alleged in the
5 complaint, whether or not they are now or may be in the
6 future in the complaint.

7 THE COURT: Okay.

8 MR. SCHROCK: And, Your Honor, just to be direct
9 about this, I mean, given it is a liquidating case, if there
10 are claims where it makes sense to pursue them, we're
11 pursuing them. If they're not, you know, we're releasing
12 them.

13 THE COURT: Well, then I think you should beef up
14 that discussion --

15 MR. SCHROCK: Okay.

16 THE COURT: -- and say that as Mr. Basta and Mr.
17 Clayton said, in the -- I think the response by the
18 subcommittee puts it in writing that --

19 MR. SCHROCK: Okay.

20 THE COURT: -- (a) the complaint has been filed,
21 and (b) if there are parties that are currently defined as
22 released parties that would be determined that there would
23 be claims against them, they would not have the benefit of
24 the release.

25 MR. SCHROCK: All right. Very well, Your Honor.

1 We'll work with counsel to subcommittee and add some
2 language.

3 THE COURT: Okay.

4 MR. FOX: Thank you. I mean, Your Honor, if the
5 debtors don't believe they have meaningful claims against --

6 THE COURT: It doesn't matter.

7 MR. FOX: -- the parties getting the partial
8 releases --

9 THE COURT: Right.

10 MR. FOX: -- fine. They can say that.

11 Lastly, the order --

12 THE COURT: I think it's more than that, though.

13 MR. FOX: Yeah.

14 THE COURT: I think it's what was just said on the
15 record.

16 MR. FOX: Right.

17 Lastly, Your Honor, with respect to I think it's
18 now paragraph 20, it was paragraph 18 of the order, which
19 provides that if a -- if there's no votes on a class, the
20 class is deemed to accept.

21 THE COURT: Right.

22 MR. FOX: I know the debtor refers to other cases
23 which have said the contrary. That's not what the statute
24 says. And we wouldn't have to do all this if it was just
25 negative notice basically.

1 THE COURT: Okay. So there's a disconnect between
2 the plan and disclosure statement on the one hand and that
3 order, proposed order on the other.

4 The plan and disclosure statement statement say
5 that the debtors will request, it doesn't say when they'll
6 request that a class where there are no votes is deemed to
7 be an accepting class.

8 I think -- I read that to mean, since it's in the
9 plan and the disclosure statement that --

10 MR. SCHROCK: Yes

11 THE COURT: -- that you're requesting to have that
12 be ruled on at confirmation.

13 MR. SCHROCK: We are, Your Honor.

14 THE COURT: So I think for the order it shouldn't
15 say that now. And instead the ballot should say that the
16 debtors intend to request at confirmation that if there are
17 no votes in a particular class it will be deemed to accept.
18 And, you know, that way people know that that's the risk
19 they take in not voting because it's not like Brazil where
20 you have to vote.

21 (Laughter)

22 MR. FOX: Thank you, Your Honor. We'll look
23 forward to seeing the, hopefully the ballots and the revised
24 form of order.

25 THE COURT: Okay. And I would even put that in

1 bold. I mean, you have some other stuff in bold. I would
2 that in bold on the ballot.

3 MR. SCHROCK: We will, Your Honor. We'll put that
4 in bold and make those changes.

5 THE COURT: Okay, because it's really, again,
6 based on the theory of implied consent.

7 MR. SCHROCK: Right.

8 (Pause)

9 MR. SCHROCK: Your Honor, the next objection was
10 the objection of Community Unit School District 300 which is
11 at ECF Number 3992. They had argued that the disclosure
12 described the extent and nature of the ongoing Illinois EDA
13 Act dispute. We added language. We believe that this
14 matter has been resolved.

15 THE COURT: Okay.

16 MR. KADISH: Well, almost.

17 MR. SCHROCK: Almost.

18 THE COURT: Okay.

19 MR. KADISH: Almost. Your Honor, Allen Kadish,
20 Archer & Greiner for Community Unit School District 300 in
21 Illinois.

22 We raised two substantive issues and I think over
23 the last hour I've heard a lot talked about the plan and
24 trust structure and the release issue. And with respect to
25 the specific language that we suggested in our objection,

1 Mr. Friedmann and I and our colleagues outside the courtroom
2 continue to negotiate the language. And I hope we're going
3 to get there.

4 THE COURT: Well, what are you still talking
5 about?

6 MR. KADISH: We're still talking about we want
7 the, in our objection we suggested language to disclose the
8 dispute between Sears and the school district that is now
9 going on in Illinois and the potential impact of that. And
10 we're down --

11 THE COURT: To me the --

12 MR. KADISH: -- we're down to one clause, I think,
13 between Chicago and Michigan.

14 MR. FRIEDMANN: Yeah. Your Honor, Jared
15 Friedmann, Weil, Gotshal & Manges on behalf of the debtors.
16 We're literally down to one line where we had quoted the
17 language of the EDA. They instead wanted to paraphrase it
18 using their interpretation. I suggested coming and just
19 saying the EDA's requirements to eliminate this.

20 THE COURT: Do that. That's fine.

21 MR. KADISH: We're -- they're negotiating as --

22 THE COURT: No. No. That's it.

23 MR. KADISH: -- as we're sitting here.

24 THE COURT: The EDA's requirements. No one cares
25 about that except your client and the debtor. Although I

1 see ESL now wants the money.

2 MR. O'NEAL: Yeah.

3 MR. SCHROCK: Yes, they do.

4 (Laughter)

5 THE COURT: Okay.

6 MR. SCHROCK: Your Honor, but I believe -- I think
7 with the language we'll either resolve it or if it hasn't
8 been resolved we would ask that the objection be overruled.

9 THE COURT: No. I -- with that change it's
10 resolved.

11 MR. SCHROCK: Okay.

12 THE COURT: Okay.

13 MR. SCHROCK: Thanks very much.

14 Your Honor, the next objection is Number 12, FTI
15 Consulting Canada in its capacity as a court-appointed
16 monitor for Sears Canada. We have agreed to resolve this
17 objection by providing them information, by providing the
18 Canadian monitor with information and intercompany claims
19 and have a conference call regarding the same. And their
20 rights to the allocation of fees and a toggle plan we're
21 noting for the record are reserved, which --

22 THE COURT: Okay.

23 MR. SCHROCK: -- it's a confirmation issue.

24 THE COURT: So the resolution doesn't involve any
25 more language to the disclosure statement. It just --

1 MR. SCHROCK: That's it.

2 THE COURT: -- is that commitment to deal with
3 that.

4 MR. SCHROCK: That's it, Your Honor.

5 THE COURT: Is that right as far as the monitor's
6 counsel is concerned?

7 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

8 THE COURT: Okay. All right. You do need to
9 update the discussion of the ruling on the stay. I think
10 that was --

11 MR. SCHROCK: Yes. We -- yeah. We'll do that,
12 Your Honor.

13 THE COURT: Okay.

14 MR. SCHROCK: Okay. Almost there. Two more.

15 So next is the objection of Cyrus Capital Partners
16 LP, ECF Number 3997. I believe that we have added
17 additional language to resolve their issue. They may have
18 wanted to speak to the 507(b) issues, but we may be
19 resolved.

20 MR. KRELLER: Your Honor, Tom Kreller of Millbank,
21 LLP on behalf of Cyrus.

22 Your Honor, we're resolved with respect to our
23 adequacy of disclosure objections. We do still have issues
24 with the plan, but we'll deal with those as plan
25 confirmation issues.

1 THE COURT: Okay. That's fine. Thank you.

2 MR. SCHROCK: Your Honor, the next two objections
3 have been resolved. Sorry, Your Honor. Just -- Item 14 is
4 Liberty Mutual Insurance Company, ECF Number 3989. We had
5 -- they had noted that they wanted a provision describing a
6 surety bond program and the debtors' certain aspects of
7 Liberty's continued rights. We said this is a confirmation
8 objection and we have noted language requested by Liberty in
9 Section 13.6 of the plan.

10 THE COURT: Okay. Is there anyone here for
11 Liberty Mutual?

12 MR. SCHROCK: And our understanding is it's
13 resolved.

14 THE COURT: Okay. I'm sorry. That's in 13.6 of
15 the plan or in the disclosure statement?

16 MR. SCHROCK: The plan, Your Honor.

17 THE COURT: Okay.

18 MR. SCHROCK: Yeah, page 66 carrying over to 67.

19 (Pause)

20 THE COURT: Okay.

21 MR. SCHROCK: Okay. Thank you.

22 THE COURT: To the extent it's still live I'll
23 overrule the objection. But it looks like it's been
24 resolved.

25 MR. SCHROCK: Yes.

1 Your Honor, next was the relator, Carl Ireland,
2 administrator of the estates of James Garbe at ECF Number
3 4007. This is, you know, an assertion that the disclosure
4 statement did not accurately reflect the mortgagee's rights
5 with respect to their super priority administrative claims.
6 We added some language to the disclosure statement as noted
7 in the debtors' response chart.

8 I believe that that matter is resolved at this
9 point with the addition of that language subject to Mr.
10 Ireland's counsel telling me I have that wrong.

11 THE COURT: Is counsel for Mr. Ireland as realtor
12 here or on the phone?

13 MR. BENZIJA: Good afternoon, Your Honor. Walter
14 Benzija of Halperin Battaglia Benzija on behalf of Carl
15 Ireland as Relator.

16 Your Honor, we have resolved the disclosure
17 statement objections subsequent to the filing of the
18 debtors' response -- reply. We did have a couple of
19 additional tweaks to some of the language and some of the
20 description which we were able to resolve yesterday. So
21 with those additional changes we have no further objection
22 to the disclosure statement.

23 THE COURT: Okay. That's fine. So that I think
24 just leaves the committee's objection.

25 MR. SCHROCK: That's right, Your Honor.

1 During the short adjournment before we were
2 scheduled to start we worked with the unsecured creditors'
3 committee counsel. They gave us a list of items that they
4 would like us to include with respect to the disclosure
5 statement. They were all disclosure related items. We did
6 not have a problem with including those items.

7 One of the items they noted was just the inclusion
8 of I think a letter from the creditors' committee that they
9 would like to go out with the disclosure statement and we
10 said, you know, subject to seeing it and making sure it's
11 accurate we were fine. Normally we like to see those before
12 we say yes.

13 But I think, you know, there were other items
14 that, you know, a number of items they asked for disclosure
15 for we agreed to walk through it. But I'll let Mr. Dublin
16 explain their position and then we can respond if necessary.

17 THE COURT: Okay.

18 MR. DUBLIN: Good afternoon, Your Honor. Phil
19 Dublin, Akin Gump, on behalf of the official committee of
20 unsecured creditors.

21 Mr. Schrock is correct that we did meet with the
22 debtors' counsel as well as counsel to the special committee
23 of the restructuring committee to go over some items that we
24 had as it relates to disclosure and on a number topics both
25 that we believe required additional disclosure based on our

1 objection as well as additional disclosure based on
2 modifications to the disclosure statement that were filed
3 yesterday.

4 They committed to work with us in good faith to
5 address language, additional language issues that we thought
6 were necessary as well as to allow us to have an opportunity
7 to comment on some of the additional language that they have
8 added that addresses points or positions that the committee
9 has that we would like to clarify further.

10 So we will endeavor to agree on language with the
11 debtors on those points and we fully expect we'll be able to
12 do so.

13 Of course as is commonplace we would like to be
14 able to submit a letter with respect to -- and in as plain
15 language or plain English as possible so that the unsecured
16 creditor body can understand what all of these pages mean
17 and what issues the creditors' committee has with the plan
18 as we go forward towards the confirmation process.

19 As we laid out in our objection we do have a
20 number of issues that go to the heart of the plan and the
21 confirmability of the plan ranging from the propriety of the
22 settlement to whether the debtors actually will be
23 administratively solvent at the end of the day, which, of
24 course, is an overriding issue in order to confirm the plan.

25 We have concerns with the PBGC settlement, the

1 scope of the releases and how the release language works in
2 relation to D&O insurance which we are going to work with
3 Mr. Basta and Mr. Clayton to ensure appropriately protects
4 the availability of D&O insurance separate and apart from
5 the scope of the releases themselves.

6 The debtors have advised today that they fully
7 expect administrative expense claims to be paid in full in
8 cash, meaning that the beneficiaries ultimately of the
9 litigation trust should be unsecured creditors in these
10 cases. As we highlight extensively in our pleading, we
11 believe (indiscernible) governs the trust should then belong
12 to the beneficiaries to choose their fiduciaries. That will
13 be an issue that we will raise in connection with
14 confirmation to the extent we are unable to resolve with the
15 debtors and the restructuring committee in advance.

16 And, of course, the best interest of creditors
17 test, there was a lot of information provided with respect
18 to the liquidation analysis yesterday or very early this
19 morning. I think it was filed around 1 a.m. One of the
20 items in there was a material increase in the claim
21 estimates for -- I believe at almost every debtor and
22 especially at K-Mart where the number went up by about 600
23 million compared to the last estimate. We've asked for
24 additional disclosure as to why that number has increased so
25 substantially in a short period of time since the debtors

1 had previously filed their last liquidation analysis.

2 The debtors have also agreed to further update
3 their administrative expense tracker which primarily
4 focusing on at this point on the professional fee budget
5 which is at page 4 of Exhibit C of what they filed, which
6 essentially stops in June. But obviously we're looking at a
7 confirmation hearing currently being scheduled toward the
8 end of July. So there needs to be some updated numbers
9 included for the various professionals in those line items
10 as well as estimates for potential costs of litigation that
11 is going to be taking place between now and then related to
12 in addition to the plan, the APA disputes, the 507(b)
13 claims, and potentially other issues.

14 So we talked to the debtors about all of those
15 issues and, again, we expect to work cooperatively to agree
16 on language and will otherwise be reserving our objections
17 to confirmation. And we, of course, will provide a copy of
18 our letter to the debtors in advance and work through any
19 comments or questions they may have so that it can be
20 included in a solicitation package.

21 THE COURT: Okay. I appreciate your opening
22 statement about making it in plain English and brief. But
23 it sounds like there's a risk that this could become a major
24 document.

25 MR. DUBLIN: We have a draft that's four pages,

1 Your Honor. I don't think we're looking at a major
2 document.

3 THE COURT: Okay.

4 MR. DUBLIN: We're trying to make it as simple as
5 possible to highlight issues and give people an idea of
6 where to look and what they can expect in treatment based on
7 the estimate so that they cannot have to read all the pages.

8 THE COURT: Okay. Well, I -- if you can't work it
9 out we should have some mechanism for me to decide --

10 MR. DUBLIN: Of course, Your Honor.

11 THE COURT: -- whether it's adequate information
12 since that really is sent out with the disclosure statement.
13 So I'll just leave it at that for now.

14 MR. DUBLIN: Understood.

15 THE COURT: I guess the only other thing I was
16 reacting to, and maybe it was just because it was a list of
17 concerns as opposed to issues which people sometimes
18 confuse, is the emphasis on potential administrative
19 insolvency. Obviously, the committee doesn't represent
20 administrative expense creditors. So the focus should be
21 on, you know, what's good for the unsecureds if there is
22 administrative insolvency.

23 MR. DUBLIN: Of course.

24 THE COURT: Okay.

25 MR. DUBLIN: Of course.

1 THE COURT: All right. Okay.

2 MR. DUBLIN: Thank you, Your Honor.

3 THE COURT: That's fine. Someone's --

4 MR. SCHROCK: Your Honor --

5 THE COURT: Someone's standing up behind you. I
6 don't know if there's an objection or --

7 MR. SCHROCK: Oh, I thought I was done.

8 MR. RAYNOR: Good afternoon, Your Honor. Brian
9 Raynor of Locke Lord on behalf of the Pension Benefit
10 Guarantee Corporation.

11 THE COURT: Good afternoon.

12 MR. RAYNOR: I think it's important that we update
13 the Court and all the other parties in interest on the
14 status of our negotiations with the debtors in our efforts
15 to incorporate the term sheet as modified for substantive
16 consolidation and to the amended plan.

17 The debtors' professionals and PBGC have been
18 negotiating in good faith. We've made a lot of progress.
19 But at this current juncture we're not entirely there in
20 supporting the plan.

21 As everybody knows there's really two versions of
22 the plan. There's the subcomm plan settlement and we think
23 we're largely there with, you know, the principle terms and
24 how that is going to work. Of course, a lot of paper was
25 filed last night. We need to screen the paper to make sure

1 there's nothing inconsistent with what we've discussed.

2 But the problem is largely, at least at this
3 juncture, with the toggle mechanism. The way the toggle
4 works currently is not a formulation that PBGC can support
5 because it leaves open a wide -- a possibility that K-Mart
6 can be the only effective debtor absent an uneconomical loan
7 to other insolvent debtors. We are continuing to negotiate
8 on the debtors --

9 THE COURT: I'm sorry. Say that again. K-Mart
10 could be the only what debtor

11 MR. RAYNOR: Plan that goes effective.

12 THE COURT: Oh, effective. Okay.

13 MR. RAYNOR: That's right. Absent an uneconomical
14 loan to other administratively insolvent debtors. We are
15 working with the debtors' professionals on a potential
16 mechanic that will address that potentially. We're not
17 there yet. We hope to be there. But we thought it was
18 important to update the Court on the possibility that if
19 there isn't a resolution on the toggle mechanism, that the
20 plan will not have PBGC support.

21 THE COURT: Okay. So the need to confirm with
22 regard to the main debtors is just for the settlement plan,
23 not the toggle plan.

24 MR. SCHROCK: Right.

25 THE COURT: Okay.

1 MR. RAYNOR: This isn't -- Your Honor, I think
2 it's important to disclose, you know, we don't object to the
3 disclosure statement going out and for soliciting votes.
4 But we do think a couple of lines added underneath the
5 description of the toggle would be important to say that in
6 its current formulation it does not have PBGC support.

7 THE COURT: Okay. So the term sheet didn't spell
8 this out?

9 MR. RAYNOR: Your Honor, the term sheet speaks of
10 PBGC and the debtors, plural, confirming the Chapter 11
11 plan. With the toggle there is a potential for a debtor to
12 confirm a plan and the rest sit in a potential Chapter 7
13 which we don't think makes sense for anybody. We don't
14 think it makes sense for PBGC. We don't think it makes
15 sense for creditors. And I would be surprised if the
16 debtors thought it made sense either. But the fact that
17 there's this potentiality out there raises a serious issue.

18 MR. SCHROCK: Yeah. Judge, in plain English --

19 THE COURT: So maybe an academic issue.

20 MR. SCHROCK: Yeah. I think it's an academic
21 issue because, you know, the thought of having one debtor go
22 effective while we have, you know, conversions for multiple
23 other debtors and have this eventuality, that's certainly
24 not the debtors' intention. If we have issues and we're
25 under the toggle plan and we have admin solvency issues,

1 we're going to be talking to admin creditors --

2 THE COURT: All right. Well, I --

3 MR. SCHROCK: -- going into confirmation.

4 THE COURT: -- I think you should add the
5 footnote, though, because --

6 MR. SCHROCK: Okay.

7 THE COURT: -- the -- when you read the disclosure
8 statement you get the view that the PBGC is on board with
9 both.

10 MR. SCHROCK: Right.

11 MR. RAYNOR: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. SCHROCK: I will do so unless I can convince
14 them otherwise, Your Honor.

15 THE COURT: That's right.

16 MR. SCHROCK: I'll add it.

17 Okay. Your Honor, I believe subject to any
18 comments the Court has which I saw your markup peeking over
19 there that -- and we are happy, of course, to incorporate
20 any comments the Court has and we would ask for approval of
21 the disclosure statement so that we can move forward,
22 resolve these language issues and begin soliciting votes on
23 the debtors' plan.

24 THE COURT: Okay. I did have a couple of comments
25 that I wanted to relay to you. And I guess I'll start with

1 the plan.

2 MR. SCHROCK: Uh-huh.

3 THE COURT: You've already talked about a couple
4 of them so I'm not going to repeat those. And I'll give you
5 my markup, too. But I'm looking at the plan here just
6 really for clarity's sake.

7 MR. SCHROCK: Uh-huh.

8 MR. SCHROCK: And there would be complimentary
9 changes in the disclosure statement. When you get to 2.1
10 which is the treatment of administrative expense claims --

11 MR. SCHROCK: Yes.

12 THE COURT: -- the first part of Section 2.8 says
13 that they will be paid on the latest of the effective date
14 or the first business day after the date that's 30 days
15 after it's allowed.

16 MR. SCHROCK: Uh-huh.

17 THE COURT: But then later it says from the net
18 proceeds of total assets, which would include litigation
19 proceeds. So it just needs to be -- is that still on the --
20 that same timing applies to that?

21 MR. SCHROCK: Yes.

22 THE COURT: Okay. Because it says, and why if the
23 amount available for distribution pursuant to the foregoing
24 clause is insufficient then from total assets. So it
25 doesn't really -- I just -- I wanted clarity on what it is.

1 I think it's the latter, but I think you should make it
2 clear that you're intending here that this is always from
3 that period.

4 MR. SCHROCK: Yes.

5 THE COURT: Unless, of course, parties agree
6 otherwise.

7 MR. SCHROCK: Yeah. That has to be the case.

8 THE COURT: Okay.

9 MR. SCHROCK: We'll make --

10 THE COURT: It's just given that it's --

11 MR. SCHROCK: Yeah.

12 THE COURT: -- X and Y, there's a suggestion that
13 maybe it's the latter.

14 THE COURT: Right. And not unless somebody would
15 agree, so.

16 THE COURT: Exactly.

17 And then the next page on fee claims, in C at the
18 bottom, it says that there's a mechanism where there's a
19 reasonable estimate to pay them made within five days before
20 the effective date. And it says that the debtors of the
21 liquidating trustee as applicable shall fund such estimated
22 amounts into the carve out account.

23 And my question was fund from where. I'm assuming
24 -- I guess the carve out includes someone has a lien on
25 everything, right, so it's basically -- it doesn't matter

1 where it comes from. This is a question for everybody. I

2 --

3 MR. SCHROCK: Yeah. I think it's either --

4 THE COURT: You can't -- in other words you can't
5 use this as a way to expand the carve out amount. But I'm
6 assuming that since there's -- there are parties that have a
7 lien on everything, it would be covered by the carve out. I
8 just want to make sure that that's the case.

9 MR. SCHROCK: Right. Other than the wind down,
10 the wind down account, of course.

11 THE COURT: Right. So I guess it's from
12 collateral.

13 MR. SCHROCK: Yes.

14 THE COURT: You know, subordinate to the carve
15 out.

16 MR. SCHROCK: Yeah.

17 THE COURT: And then in the treatment of the ESL
18 and 507(b) priority claims, it says they are to be paid
19 prior to the payment of any other administrative expense
20 claims other than fee claims. But it's just fee claims from
21 the carve out, right? It's not --

22 MR. SCHROCK: It is.

23 THE COURT: So you should probably put that in,
24 other than the fee claims to the extent of the carve out.

25 MR. SCHROCK: Okay. Got it.

1 THE COURT: And then in -- right below there where
2 it talks about the separate plans, it says, claims against
3 each debtor other than admin expense claims and priority tax
4 claims are classified. But I think you should add to that
5 list the other 507 priority claims and the ESL priority
6 claims.

7 MR. SCHROCK: Right. Yeah. We will do so.

8 THE COURT: Okay. I'm not going over all these.
9 I think some of them are --

10 MR. SCHROCK: Okay.

11 THE COURT: -- just self-explanatory.

12 I have -- in each -- when you deal with the other
13 secured claims, the treatment of them, and they show up in
14 various guises it says that they're impaired. I guess you
15 don't need to make this point here, although you could drop
16 a footnote saying impaired because of the release issue.
17 But you should definitely do that in the disclosure
18 statement.

19 MR. SCHROCK: We'll do that in the DS, Your Honor.

20 THE COURT: Okay. In the treatment of the PBGC
21 claims there's a defined term, specified GUC liquidating
22 trust interest that's not in the defined terms. So I don't
23 know if that's from an earlier version, but --

24 MR. SCHROCK: Yeah. It's a --

25 THE COURT: -- I think it needs to just be --

1 MR. SCHROCK: We'll correct that.

2 THE COURT: -- fixed.

3 Oh, so on page 48, I just made your job more
4 difficult, but I should raise it. At the carry over
5 paragraph at the top it talks in the toggle plan about the
6 ability to make these intercompany loans.

7 MR. SCHROCK: Yes.

8 THE COURT: And it says that those loans shall be
9 immediately repaid from and secured by an automatically
10 perfected first priority lien on the proceeds of preserved
11 causes of action.

12 Now you've already given a first priority lien to
13 PBGC. So I don't know how those relate to each other, if
14 they're both first or --

15 MR. SCHROCK: Yeah. First. Right. I mean, the
16 -- given the 507(b) claims which technically have to be paid
17 to go effective our thought was that the 507(b)s are up top
18 and then the, you know, the PBGC goes -- you know, doesn't
19 have a lien as a first priority interest, you know,
20 effectively right behind it. But we'll clarify.

21 THE COURT: But this is -- but this would be a
22 loan. This isn't a 507(b). This is a -- the intercompany
23 loan.

24 MR. SCHROCK: Right. I -- and I misspoke. I
25 mean, the -- to the extent we needed to repay those

1 intercompany loan claims which were admin claims necessary
2 to go effective, it's the same --

3 THE COURT: So you think that would --

4 MR. SCHROCK: -- same issue.

5 THE COURT: -- go first?

6 MR. SCHROCK: Yes, it would.

7 THE COURT: But you -- I think you should just
8 make that clear --

9 MR. SCHROCK: Okay.

10 THE COURT: -- then.

11 MR. SCHROCK: We'll do that.

12 THE COURT: I skipped something and I apologize.

13 Going back to page 12, the definition of other assets, 1.116
14 --

15 MR. SCHROCK: Uh-huh.

16 THE COURT: -- there's a potential ambiguity here.
17 It says, "Means all remaining assets of each of the debtors,
18 other than the specified causes of action, other causes of
19 action, and credit bid release consideration."

20 So the question I have is, is the other -- are the
21 other causes of action and the credit bid release
22 consideration part of the carve out, that it's all, you
23 know, other than --

24 MR. SCHROCK: Yes. Yeah. It's a list.

25 THE COURT: It's --

1 MR. SCHROCK: Yeah.

2 THE COURT: Knowing your adversary here I think
3 you should be just a little clearer on that.

4 MR. SCHROCK: Okay. Thank you.

5 THE COURT: And then this is, I think, a holdover
6 from another plan.

7 MR. SCHROCK: Oh, boy.

8 THE COURT: On page 49 at 9.5 it says, on the
9 effective date all liquidating trust assets of the debtor
10 shall be transferred to their respective liquidating trust
11 of such debtor.

12 MR. SCHROCK: Right.

13 THE COURT: But it's -- I think it's now just the
14 --

15 MR. SCHROCK: Right.

16 THE COURT: -- liquidating trust.

17 MR. SCHROCK: It's just the one trust. Yeah.

18 THE COURT: And we talked about the language on
19 the release of the people that, in 15.11 I think that we
20 just talked about. That needs to be --

21 MR. SCHROCK: Yes.

22 THE COURT: I think we worked --

23 MR. SCHROCK: Yeah.

24 THE COURT: So those -- I think those are needed
25 to make the plan clear.

1 MR. SCHROCK: Uh-huh.

2 THE COURT: And there are conforming changes to
3 the disclosure statement which I'll give you, but let me go
4 through the ones that may not be clear.

5 Kind of an odd statement on page 3. It says, the
6 liquidating trustee will, among other things, be responsible
7 for all decisions and duties with respect to, and then it
8 lists five things. I guess because it says among other
9 things, but I just --

10 MR. SCHROCK: Right.

11 THE COURT: -- you know, he's going to be
12 responsible for everything, right?

13 MR. SCHROCK: Yeah.

14 THE COURT: So --

15 MR. SCHROCK: Subject to the oversight of the --

16 THE COURT: Yeah.

17 MR. SCHROCK: -- the board.

18 THE COURT: So I think I would probably change
19 that to just -- for every -- you know, he does everything.

20 MR. SCHROCK: Okay.

21 THE COURT: And then in the charts for admin
22 claims, priority claims, it has them being paid out of the
23 net proceeds of total assets. I don't know if you want to
24 add a footnote, you know, it's -- that unless otherwise
25 agreed it would be on the effective date.

1 MR. SCHROCK: Right. Yeah. We will make that
2 change. That's --

3 THE COURT: Okay. And then this chart doesn't
4 have what I just wrote down in shorthand the K-Mart
5 guarantee claims. So I think you need to add that.

6 MR. SCHROCK: Yeah.

7 THE COURT: And that can also clarify Mr. Fox's
8 point about, you know, they're separate so that's what they
9 -- they get that.

10 (Pause)

11 THE COURT: Actually, this was a plan comment,
12 although I put it here instead. But you should think of it
13 in the plan, too.

14 The released parties include the liquidating
15 trustee and the liquidating trust board.

16 MR. SCHROCK: Uh-huh.

17 THE COURT: And your response explains, in
18 response to the U.S. Trustee's objection, that this is in
19 their capacity as successor in assign, but not with respect
20 to their post-effective date --

21 MR. SCHROCK: Right.

22 THE COURT: -- conduct. But I think you should
23 have put that in the plan, although you could add, you know,
24 Barton type language.

25 MR. SCHROCK: Yeah. I understand, Judge. We'll

1 add that.

2 THE COURT: Okay. Then on page 11, at the top
3 there there's a paragraph that says, ballot. And I think
4 this is where you put in bold that the debtors intend to
5 request the Court to treat any class where there have been
6 no votes at all as an accepted class. And just, you know --

7 MR. SCHROCK: Got it.

8 THE COURT: -- put that in bold, you know, deeming
9 it to have consented.

10 MR. SCHROCK: Will do.

11 THE COURT: On page 14, you have the chart of the
12 prepetition indebtedness. I think you should put a footnote
13 here, because at the bottom of that it says, total
14 intercompany debt.

15 MR. SCHROCK: Uh-huh.

16 THE COURT: But you should say excluding or
17 exclusive of intercompany claims or balances because that's
18 obviously a --

19 MR. SCHROCK: Right.

20 THE COURT: -- a big issue for people.

21 And in the discussion on page 20 I think you
22 should -- on the intercompany claims and notes discussion I
23 think you should add, maybe this is in the committee's
24 language they're giving you, but I think you should add a
25 sentence saying how the intercompany obligations have lien

1 and priority status, and maybe have a cross-reference to the
2 K-Mart guarantee claim section.

3 MR. SCHROCK: Got it.

4 THE COURT: And then on the next page, on 21,
5 after you say, as more recent -- as (indiscernible) set
6 forth in Section 4(n) below, the PBGC settlement provides
7 that the PBGC will take all reasonable actions requested by
8 the debtors to cause KCD to waive any alleged administrative
9 expense claim against the debtors arising from the failure
10 to make royalty payments.

11 MR. SCHROCK: Uh-huh.

12 THE COURT: I don't know if this is the committee
13 language. If it is you should just go with the committee
14 language. But there should be some note here that the
15 committee asserts that the main or the primary obligor on
16 those administrative expense claims would not have the
17 wherewithal to pay more than X percent of them.

18 MR. SCHROCK: Yes.

19 THE COURT: On the next page -- well, it starts on
20 page 21, you talk about the Ezrack (sic) medium terms notes,
21 the Sparrow term loan and the Sparrow mezzanine term loan.
22 What do they -- this doesn't say what they get under the
23 plan, how they're treated. Are they in a particular class?
24 Are they getting no distribution?

25 MR. SCHROCK: Well, they were -- you know, they

1 were among non-debtors, Your Honor. So --

2 THE COURT: But they have -- but they are --

3 (Pause)

4 THE COURT: Do they have any claims against the
5 debtors? That's my --

6 MR. SCHROCK: No, they --

7 THE COURT: -- question.

8 MR. SCHROCK: -- don't, Your Honor.

9 THE COURT: All right.

10 MR. SCHROCK: That's just informational. So --

11 THE COURT: Okay.

12 MR. SCHROCK: -- that may be unnecessary.

13 THE COURT: Well --

14 MR. KRELLER: Your Honor, Tom Kreller for Cyrus.

15 It -- Cyrus holds some of those MTNs that are purchased at
16 the auction. So they -- so Cyrus does have unsecured claims
17 against the issuers --

18 MR. SCHROCK: Oh, I was referring to the --

19 MR. KRELLER: -- of those notes.

20 MR. SCHROCK: -- Sparrow loans.

21 THE COURT: But then there's Ezrack and -- yeah,
22 it's just Ezrack.

23 MR. SCHROCK: Correct.

24 THE COURT: So --

25 MR. SCHROCK: The Sparrow loans, though, those

1 were transferred along with DSL to --

2 UNIDENTIFIED SPEAKER: Correct.

3 MR. SCHROCK: Right.

4 THE COURT: Okay. And on Ezrack do they have a
5 claim --

6 MR. SINGH: Yeah, Judge. The --

7 THE COURT: But don't the -- is this the one where
8 they don't get any distribution as long as there's --

9 MR. SINGH: No. No, Your Honor. In the latest
10 changes to the plan the definition section has the Ezrack
11 notes specifically included and then they're all given
12 general unsecured treatment.

13 THE COURT: Okay. Okay.

14 All right. I think on page 55 you say in
15 addition, in accordance with Section 2.1 of the plan to the
16 extent that the debtors determine that there will be an
17 administrative shortfall the debtors may solicit
18 administrative claimants.

19 MR. SCHROCK: Uh-huh.

20 THE COURT: I think you should probably say either
21 before or after the confirmation hearing, or something like
22 that.

23 (Pause)

24 THE COURT: This was just a question. We've added
25 the language that I think responded to ESL's objection about

1 the ability to object to their claims. I don't -- I just
2 don't remember, were they allowed for all purposes or just
3 for purposes of the credit bid?

4 MR. SCHROCK: I thought it was for all purposes.

5 MR. SINGH: Yes.

6 THE COURT: Anyway, just --

7 MR. SINGH: Your Honor, it's for --

8 THE COURT: Just double check that.

9 MR. SINGH: Yeah. In the sale order it's for all
10 purposes.

11 MR. SCHROCK: Yeah.

12 THE COURT: But they were allowed just in a -- I
13 mean --

14 MR. SINGH: Your Honor, they were allowed just
15 with respect to the particular notes that were being credit
16 bid. To the extent they have other claims, it's an open
17 issue and I -- Mr. O'Neal can correct me if I'm wrong.

18 THE COURT: Anyway, I just want to make sure you
19 focus on this one to get it --

20 MR. O'NEAL: Yeah.

21 THE COURT: -- get it clear.

22 MR. O'NEAL: Your Honor, we'll work with the
23 debtors. But it was the -- the claims scheduled on Exhibit
24 G --

25 THE COURT: Right.

1 MR. O'NEAL: -- were allowed in full for all
2 purposes.

3 THE COURT: Well, this was my question is I don't
4 see how one can allow them in full as secured claims because
5 I had -- no one had fixed the value of the collateral yet.

6 MR. O'NEAL: They are -- why don't we --

7 MR. SCHROCK: The amount is --

8 MR. O'NEAL: Yes. The amount is --

9 THE COURT: The amount.

10 MR. O'NEAL: -- fixed.

11 THE COURT: So I think that's --

12 MR. O'NEAL: And the amount is allowed for all
13 purposes. And we can look at the language of the sale order
14 and make sure it conforms to the sale order.

15 THE COURT: Okay. All right.

16 MR. BASTA: Your Honor, Paul Basta. Just one
17 other point. And this will be part of the dispute that we
18 have with ESL. Part of the relevance of this allowance
19 dovetails to the treatment obviously because if it's
20 recourse only to --

21 THE COURT: Right.

22 MR. BASTA: -- the non-litigation proceeds --

23 THE COURT: Then the credit bid --

24 MR. BASTA: -- it didn't really --

25 THE COURT: -- the credit bid consideration --

1 MR. BASTA: Right. It did -- so they kind of go
2 together.

3 THE COURT: But I -- but just focusing on this,
4 and I was just focusing on the value point --

5 MR. BASTA: Understood.

6 THE COURT: -- because that's one of your issues
7 with the 507(b) point. Nothing from nothing is nothing.
8 That's basically the debtors' argument, right?

9 MR. SCHROCK: Yes.

10 THE COURT: Okay. You can't have a secured claim
11 that's diminished in value if it never had any value in the
12 first place.

13 MR. SCHROCK: Correct.

14 THE COURT: All right.

15 Okay. Well, you've got to clean up page 65, third
16 paragraph of the footnote.

17 MR. SCHROCK: Uh-huh.

18 THE COURT: And I'm assuming the committee's given
19 you language.

20 (Laughter)

21 MR. SCHROCK: Yes. That's -- it was a late night,
22 Judge. Sorry. And the same for 66.

23 THE COURT: All right. And the last point is on
24 the release discussion on page 153. The third full
25 paragraph says, for those who abstain from voting or vote to

1 reject the plan, but do not opt out of the third party
2 releases on the ballots, the debtors will demonstrate at
3 confirmation that such releases are an integral part of the
4 plan and can be approved on a consensual basis. And then I
5 would add this phrase in bold, if you don't opt out, or on
6 -- and then continue on, or on a non-consensual basis under
7 Metro Media.

8 MR. SCHROCK: Yeah. We'll add that in bold, Your
9 Honor.

10 THE COURT: Well, I think you say -- if you don't
11 opt out and/or don't object to confirmation, say that.

12 MR. SCHROCK: Okay.

13 THE COURT: Okay. So let me just make sure. The
14 liquidation analysis.

15 (Pause)

16 THE COURT: Okay. So with those changes I will
17 approve the disclosure statement as containing adequate
18 information and let the debtors solicit acceptances.

19 Obviously you need to go over the letter with the
20 committee.

21 MR. SCHROCK: Yes.

22 THE COURT: And you should quickly circulate a
23 redline of the changes to the plan and disclosure statement
24 to the people who objected and --

25 MR. SCHROCK: Yes, we will.

1 THE COURT: -- and the other parties you've been
2 dealing with like the PBGC. And then you don't need to
3 settle it, just in a brief period, and then e-mail it to
4 chambers with a clean blackline and the order.

5 MR. SCHROCK: Thank you very much, Your Honor. We
6 --

7 THE COURT: Okay.

8 MR. SCHROCK: -- really appreciate it.

9 THE COURT: Okay. And it's clear to me that there
10 are still important differences to be resolved here on the
11 settlement plan aspect of this as well as other issues that
12 the committee has raised, including the composition of the
13 liquidating trust board and the like. There are related
14 issues as to the treatment of administrative expenses, which
15 we talked about last week, and 507(b) claims.

16 Some of those can be decided very quickly. Some
17 can be decided at confirmation. If the parties want to have
18 help with an independent third party in trying to resolve
19 them, I'm amenable to that as long as we stay on schedule
20 unless parties have really made enormous progress in that
21 process, or as I keep saying to you all, you're fully
22 capable of negotiating these things among yourselves, too.

23 But if it's -- if you decide to go the former
24 route, let me know and, you know, I have a standard
25 mediation order. I also have a couple of my judge

1 colleagues who not only owe me one, but have said they owe
2 me one and are willing --

3 (Laughter)

4 THE COURT: So if you want a judicial mediator,
5 just someone who, at least one, maybe two who would be
6 available.

7 MR. SCHROCK: Yeah. Thanks very much, Your Honor.
8 We're going to discuss that with the restructuring committee
9 --

10 THE COURT: Okay.

11 MR. SCHROCK: -- and discuss it with the committee
12 and other parties and we'll --

13 THE COURT: I mean --

14 MR. SCHROCK: -- try and come to grounds on it.

15 THE COURT: -- a mediation isn't free, although if
16 it's with a judge that part is free.

17 MR. SCHROCK: That's almost free.

18 THE COURT: But there are a lot of parties who
19 attend and participate. But if it's cost effective, if
20 people think it would be worthwhile, then, you know, you
21 shouldn't hesitate to request it.

22 MR. SCHROCK: We're open to just about anything,
23 Judge.

24 THE COURT: Okay.

25 MR. SCHROCK: All right.

1 THE COURT: All right. Very well. Thank you.

2 MR. SCHROCK: Thank you.

3 (Whereupon, these proceedings concluded at 3:58 p.m.)

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I N D E X

RULINGS

Page

Motion to Approve : Debtors Motion for an Order (I)

Approving Disclosure Statement; (II) Establishing

Notice and Objection Procedures for Confirmation of

the Plan; (III) Approving Solicitation Packages and

Procedures for Distribution Thereof; (IV) Approving

the Forms of Ballots and Establishing Procedures for

Voting on the Plan; and (V) Granting Related Relief

(related document(s) 3276, 3275

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C E R T I F I C A T I O N

I, Sherri Lynn Breach, certify that the foregoing
transcript is a true and accurate record of the proceedings.

Sherri L
Breach

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